employ due diligence to serve Metric Property prior to the expiration of the applicable limitations period." App. A.

On September 19, 2005, the Court of Appeals denied Petitioner's petition for rehearing, and this denial was filed by the clerk on September 29, 2005. App. C.

This Petition follows.

## III. Facts

This Petition arises from the District Court's summary judgment dismissal of Petitioner's lawsuit for personal injury and property damage on limitations grounds. The suit arises out of exposure to toxic mold at the apartment complex in which Petitioner once resided – the Stonegate Villas Apartments ("the Apartments") located in Fort Worth, Texas.

Mr. Bryant resided at the Apartments beginning in late 1999. He testified that while residing in the Apartments, he "got pretty ill, and that was probably December of 2000." Plaintiff's SJ App. at p. 6, lines 15-18.

He first filed a lawsuit against the defendants responsible for the Apartments on September 28, 2001. Plaintiff's SJ App. at p. 33. His first case was dismissed without prejudice by unopposed motion on November 1, 2001, because he was not sufficiently healthy to travel to a court-mandated settlement conference. ROA Vol. 1 at p. 149.

He next filed the suit from which this Petition arises on October 25, 2002 against those at interest with the Stonegate Villas Apartments, including Respondent Metric Property Management, Inc., as a result of his illnesses,

injuries, and property damage stemming from his exposure to toxic mold during his residency at the apartment complex. The suit was filed in the 17th District Court of Tarrant County, Texas cause no. 17-195753-02. ROA Vol. 1, at pp. 10-27.

Respondent was served with process in this second suit on March 18, 2003. ROA Vol. 1, at p. 150.

Soon after Respondent was served in the second suit, the three defendants removed it to the District Court for the Northern District of Texas, Fort Worth Division, on March 25, 2003, based on complete diversity of citizenship between the parties. 28 U.S.C. § 1332(a). Docket Item 1, ROA Vol. 1, at 1.

Once in federal court, the Defendants moved for summary judgment arguing, *inter alia*, that Petitioner's tort claims were barred by the two-year tort statute of limitations and that service had not been timely effectuated. ROA Vol. 1 at pp. 137-39.

Mr. Bryant responded to the defendant's motion for summary judgment, presenting evidence. ROA Vol. 1, at p. 187. However, he agreed that his claims against two of the Defendants (*i.e.*, Stonegate Villas and USRP Texas GP, LLC) should be dismissed. ROA Vol. 1, at p. 194. Hence, only Respondent Metric Property Management, Inc. remained in the suit as a defendant. ROA Vol. 2, at p. 336.

On June 17, 2004, the District Court granted Defendant Metric's Motion for Summary Judgment in its entirety. Appendix B; 2004 WL 1359526; ROA Vol. 2, at p. 346. On appeal, the Court of Appeals for the Fifth

Circuit affirmed this decision. Appendix A, 142 Fed. Appx. 809 (5th Cir. 2005).

## REASON FOR REVIEW

1. **The Courts below erred in determining that Petitioner failed to raise a genuine issue of material fact as to whether he exercised due diligence as required by Texas state law in obtaining service of process on Respondent after the lawsuit was on file. Summary judgment evidence – namely, the declaration of attorney Jerry C. von Sternberg, Plaintiff's Summary Judgment Appendix at pp. 33-34 – reflects that Petitioner indeed raised a fact issue regarding the use of diligence in executing service of process on Respondent, which is sufficient to prelude the issuance of summary judgment on limitations grounds. Fed. R. Civ. P. 56.**

Mr. Bryant's lawsuit – which was actually his *second* such lawsuit regarding this claim – was timely filed within the Texas state law two-year limitations period for tort because suit was filed in Texas state court on October 25, 2002 and the District Court correctly so found in its opinion (App. B) and the Court of Appeals affirmed (App. A).

The dispute arises because Respondent was not ***served with process*** until March 18, 2003. Under Texas law, where a plaintiff timely files a lawsuit within the relevant limitations period – as undisputedly happened here – but does not serve a defendant until after a limitations period expires, the date of service relates back to the

initial filing so as to make the suit timely *provided* the plaintiff used due diligence in effecting service; the filing of a petition alone does not interrupt the running of limitations. *Gant v. DeLeon*, 786 S.W.2d 259, 260 (Tex. 1990); *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 830 (Tex. 1990). In such a situation, the plaintiff must show that he exercised due diligence in the issuance and service of citation *Murray*, 800 S.W.2d at 830.

Generally, under Texas law, the issue of whether a plaintiff exercised due diligence in obtaining service is a fact question that should be resolved by trial. *See Hodge v. Smith*, 856 S.W2d 212, 215 (Tex. App. – Houston [1st Dist.] 1993, writ denied); *Bilsing v. State Indus.*, 173 F. Supp. 2d 593 (S.D. Tex. 2001) (applying Texas limitations law).

Several Texas courts have outlined the standard necessary to judge due diligence in obtaining service. *See Tate v. Beal*, 119 S.W.3d 378, 381 (Tex. App. – Fort Worth 2003, pet. denied):

> Generally, the exercise of due diligence is a question of fact that is determined by a two-pronged inquiry: (1) whether the plaintiff acted as an ordinary prudent person would have acted under the same circumstances; and (2) whether the plaintiff acted diligently up until the time the defendant was served.

*Id.* at 381; *Zimmerman v. Massoni*, 32 S.W.3d 254, 256 (Tex. App. – Austin 2000, pet. denied). If an excuse is presented, such evidence becomes a fact issue. As the *Tate* court found,

> Viewing all of the evidence and its reasonable inferences in the light most favorable to [plaintiff]

> Tate, we hold that a fact issue exists concerning whether Tate exercised due diligence in effecting service on Beal. *See S.W. Elec. Power Co. [v. Grant],* 73 S.W.3d at 215. . . . Accordingly, [defendant] Beal did not establish lack of diligence as a matter of law, and summary judgment is improper.

*Tate,* 119 S.W.3d at 381-82.

Texas courts have held that **unexplained** delays of five and six months in procuring issuance and service of citation constitute a lack of due diligence as a matter of law. *Keeton v. Carrasco,* 53 S.W.3d 13, 18 (Tex. App. – San Antonio 2001, pet. denied); *see also Instrument Specialties Co. v. Texas Employment Commission,* 924 S.W.2d 420 (Tex. App. – Fort Worth 1996, writ denied) (six months); *Hansler v. Mainka,* 807 S.W.2d 3 (Tex. App. – Corpus Christi 1991, no writ) (five months); *Allen v. Bentley Laboratories,* 538 S.W.2d 857 (Tex. Civ. App. – San Antonio 1976, writ ref'd n.r.e.) (six months).

The delay between filing of suit and service of process in this case, however, was **less than five months** (*i.e.*, 144 days between October 25, 2002 and March 18, 2003), and it was indeed explained.

Under Texas law, a defendant may obtain summary judgment based on the lack of a plaintiff's diligence in serving the petition, if the plaintiff offers **no excuse** for the delay in procuring the service of citation, or if the lapse of time in the plaintiff's failure to act is so long as to conclusively negate any possible diligence. *Ray v. O'Neal,* 922 S.W.2d 314, 317 (Tex. App. – Fort Worth 1996, no writ); *De La Torre v. Our Lady of Guadalupe Center,* 807 S.W.2d 889, 890 (Tex. App. – Corpus Christi 1991, no writ).

If a defendant affirmatively pleads the defense of limitations and shows the failure to timely serve the defendant, "the burden shifts to the plaintiff to explain the delay." *Murray,* 800 S.W.2d at 830. If the plaintiff proffers summary judgment evidence that purports to explain the delay, then **the defendant must demonstrate** that the explanation of diligence is insufficient as a matter of law. *See Weaver v. E-Z Mart Stores, Inc.,* 942 S.W.2d 167, 169 (Tex. App. – Texarkana 1997, no writ), *quoting Gant,* 786 S.W.2d at 260 (Tex. 1990); *Murray,* 800 S.W.2d at 830 (Tex. 1990); *accord Zale Corp. v. Rosenbaum,* 520 S.W.2d 889, 891 (Tex. 1975).

The existence of diligence in obtaining service of process is ordinarily a question of fact and should be found as a matter of law **when no excuse is offered**. *Saenz v. Keller Industries of Texas, Inc.,* 951 F.2d 665, 667-68 (5th Cir. 1992); *Valdez v. Charles Orsinger Buick Co.,* 715 S.W.2d 126 (Tex. App. – Texarkana 1986, no writ). In these two Texas cases – which are cited and discussed in the District Court's opinion – the acceptable excuse involved the fact that a court official (*i.e.*, a clerk) had furnished inaccurate information to a litigant about the status of service, thus causing confusion.

The more recent Texas case of *Keeton v. Carrasco,* 53 S.W.3d 13, 19-20 (Tex. App. – San Antonio 2001, no pet.), illustrates that an attorney's actions – separate and apart from any involvement of a court official – can also be a sufficient excuse for a delay in effecting service of process. In *Keeton,* the Court held that a genuine issue of material fact prevented the granting of summary judgment in a case where a plaintiff, after an initial faulty service of process, did not serve a defendant until 68 days after the statute of limitations had run:

> As the court stated in *Gonzalez [v. Phoenix Frozen Foods],* 884 S.W.2d 587 (Tex. App. – Corpus Christi 1994, no writ)], one means by which a diligent attorney could determine that a problem with service exists is by noticing whether or not an answer is timely filed. 884 S.W.2d at 590. Unlike *Gonzalez,* where the attorney failed to notice the absence of an answer for 14 months, and *Jimenez,* where the attorney failed to notice the absence of an answer for eight months, **the attorney in the instant case immediately noticed when the answer was not filed by the answer date as he calculated that date.**
>
> Although the Keetons' attorney appears to have miscalculated the answer date, resulting in a one month delay in checking the file to determine the reason for Carrasco's failure to answer, **this involved more of a miscalculated effort due to inadvertence rather than inactivity.**

53 S.W.3d at 20 (emphasis added).

Petitioner's attorney followed a similar procedure in using the answer date to check service. Thus, an analysis similar to *Keeton* should govern the issue of diligence in effectuating service of process. Here, the explanation was the attorney's inadvertent failure to request a file-stamped copy of a pleading. Indeed, the attorney did not make a miscalculation of the date as in *Keeton*. Notwithstanding the evidence of pure inadvertence, the courts below rejected Petitioner's/Plaintiff's explanation for delay in obtaining service of process. This was incorrect because it removed what was, at very least, a disputed fact issue as to diligence under the circumstances from the trier of fact. Fed. R. Civ. P. 56; *Hodge v. Smith,* 856 S.W.2d 215.

The testimony of Petitioner's lawyer pro-vides as follows:

> Mr. Bryant first filed his suit against Defendants herein on September 28, 2001. That case was dismissed without prejudice by unopposed motion on November 1, 2001, because the Plaintiff was not healthy enough to travel to the court mandated settlement conference.
>
> Once his health stabilized, Mr. Bryant requested that we re-initiate his suit and on October 25, 2002, the case was re-filed in the state district court of Tarrant County, Texas.
>
> The firm's practice at that time was to file the Petition, and request that the clerk return a file stamped copy so that process could then be requested from the Clerk's office in separate correspondence. **Receipt of the file-stamped copy of the Petition from the Clerk is what then would trigger our requesting and monitoring issuance and service of citation. I understood that such had occurred, and was waiting for Defendants' answer to arrive in the office over the Holidays. Having not seen an answer arrive by February 2001, I investigated the service situation and was advised that no citations were requested.**
>
> On February 28, 2003, when I learned that no citation had been requested, I immediately requested citations. Such were served on defendants in March, 2003. Defendant alleged they were served on March 18, [2003] and Defendants removed the action to federal court on March 25th [2003].
>
> Upon further investigation, it appears that our office made a clerical error when submitting the

> Original Petition to the state court in that there was no self-addressed return envelope enclosed in the filing package and the Court never return the filed Petition for us to begin the service of process procedure.

Plaintiff's SJ App. at pp. 33-34. This raises a fact issue as to whether Petitioner's actions in effecting service of process were reasonable under the circumstances. *See Keeton*, 53 S.W.3d at 19-20. This also demonstrates that there was "no period of unexplained activity" in the service of process scenario. *Walls v. Travis County*, 958 S.W.2d 944, 947 (Tex. App. – Austin 1998, pet. denied); *Hodge*, 856 S.W.2d at 215-6.

Because Petitioner introduced evidence ac-counting for the time delay between filing of suit and effectuating service of process, Texas law provides that Respondent became required to show any entitlement to summary judgment as a matter of law. *See Gant* 786 S.W.2d at 260 (Tex. 1990). The reasonableness of Petitioner's efforts in obtaining service of process thus became, at least, a fact inquiry that must be resolved at trial rather than by summary judgment under Federal Rule of Civil Procedure 56. The declaration put Metric to its proof to show that Petitioner was unreasonable in his decision as to the steps taken in order to effect service. Respondent never carried this burden. *Hodge v. Smith*, 856 S.W.2d at 215-16.

Finally, Mr. Bryant's case presents a situation where usual concerns about timely service do not apply. The clear underlying purpose of the diligent service requirement – *i.e.*, that a defendant be timely advised of the suit so that he can prepare defense and not be prejudiced by the passage of time – is utterly inapplicable here. In *Matthews Construction Co. v. Rosen*, 796 S.W.2d 692, 692 (Tex. 1990),

the Texas Supreme Court stated, "a statute of limitations serves primarily to compel the assertion of a cause of action within a reasonable time so that the opposing party has a fair opportunity to defend while witnesses are available." *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 351 (Tex. 1990). "It prevents the bringing of stale claims." *Id., citing Robinson v. Weaver,* 550 S.W.2d 18, 20 (Tex. 1977).

This was Mr. Bryant's **second** filing of his case; he dismissed his first suit – which was filed and prosecuted well inside the relevant limitations period for tort – because his health prevented him from traveling to a court-ordered conference. It is undisputed that Metric answered Mr. Bryant's first suit, participated in that action, and was unopposed to its dismissal, all of which occurred well within the two-year tort statute of limitations. Thus, the delay in service discussed herein has no possibility of surprising or prejudicing Respondent. To quote the Texas Supreme Court in *Matthews*, "To apply limitations under these circumstances would fail to serve the underlying purpose of limitations and instead would be a purely formal exercise." 796 S.W.2d at 692. According to the Dallas Court of Appeals, the "purpose of a statute of limitation is not only to encourage a plaintiff to prosecute his claims within a period of time but, just as important, to advise the defendant of the claim against him in a timely fashion so that he may prepare his defense and preserve evidence before the lapse of time has rendered this process difficult, if not impossible." *Broom v. MacMaster*, 992 S.W.2d 659, 664 (Tex. App. – Dallas 1999, no pet.). "[I]t is the service of process that gives the defendant legal notice of the allegations being made against him." *Id.*

Based on the contents of the declaration of attorney Jerry C. von Sternberg, the determination below that Petitioner's claims are time barred should be reversed. Under these facts, Petitioner presented a sufficient excuse that raised a fact issue as to the exercise of diligence in service, thus making Petitioner's tort claims timely. Fed. R. Civ. P. 56.

## CONCLUSION

Faced with a summary judgment based on limitations grounds, Petitioner introduced sufficient evidence to raise a genuine issue of material fact as to whether he exercised due diligence in obtaining service of process on defendant. WHEREFORE PREMISES CONSIDERED, Petitioner prays that this Court grant the petition for Writ of Certiorari and hear this case on its merits. Petitioner prays for such other and further relief to which he may be entitled.

Respectfully submitted,

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**APPENDIX A**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 04-10941
Summary Calendar

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THOMAS BRYANT,

Plaintiff-Appellant,

versus

STONEGATE VILLAS; ET AL.,

Defendants,

METRIC PROPERTY MANAGEMENT, INC.,

Defendant-Appellee

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Appeal from the United States District Court
for the Northern District of Texas
(USDC No. 4:03-CV-212-Y)

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(Filed August 1, 2005)

Before REAVLEY, HIGGINBOTHAM and CLEMENT, Circuit Judges.

PER CURIAM:*

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* Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

We have reviewed the summary judgment record de novo and agree with the district court that summary judgment was properly granted in favor of Appellee Metric Property Management, Inc. We agree with Metric Property that Appellant Bryant's suit sounded in tort for limitations purposes, and that the suit was therefore subject to a two-year limitations period under Texas law. Although in November of 2000 Bryant resided in the apartment alleged to be contaminated, he failed to bring suit until of October of 2002 and then failed to serve the defendant until March of 2003. As to both the personal injury and property damage claims, summary judgment was warranted because Bryant failed to file suit and employ due diligence to serve Metric Property prior to the expiration of the applicable limitations period.

We do not agree with Bryant that the limitations period for his property damage claims did not begin to run until the publication of the Upah report in March of 2001, which merely confirmed the existence of certain molds in his apartment. Bryant was a certified environmental inspector and suspected environmental contamination of the apartment months before the Upah report issued. In December of 2000 Bryant sought medical attention and had noticed that his symptoms got worse when he was in his apartment. Dr. Rea attested that Bryant sought treatment in January 2001 with complaints of mold exposure. In these circumstances the limitations period was not tolled until the date of the Upah report. The general rule is that "a cause of action accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred." *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996). The discovery rule is not applicable because it only extends the

limitations period in cases where "the alleged wrongful act and resulting injury were inherently undiscoverable at the time they occurred. . . ." *Id.* at 6. An injury is considered inherently undiscoverable only "if it is by nature unlikely to be discovered within the prescribed limitations period despite due diligence." *Id.* at 7. In the pending case, Bryant suspected mold contamination, complained of such, looked into new ducts for his apartment, and sought testing for mold before the issuance of the Upah report. The alleged property damage was not inherently undiscoverable prior to the report.

If we reached the question of the lack of evidence of causation to resist summary judgment, we would be inclined to agree with the opinion of the district court.

AFFIRMED.

## APPENDIX B

Not Reported in F.Supp.2d, 2004 WL 1359526 (N.D.Tex.)

United States District Court,
N.D. Texas, Fort Worth Division.

Thomas BRYANT
v.
METRIC PROPERTY MANAGEMENT, INC.
No. Civ.A. 4:03-CV-212-Y.

June 17, 2004.

Francis I. Spagnoletti, Spagnoletti & Co, Houston, TX, for Plaintiff.

Gary R. Powell, Locke Liddell & Sapp, Dallas, TX, for Defendant.

### ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

MEANS, J.

Pending before the Court is defendant Metric Property Management, Inc.'s Motion for Summary Judgment [doc. # 10-1], filed October 14, 2003. Having carefully considered the motion, response, and reply, the Court concludes that the motion should be GRANTED.

### I. RELEVANT BACKGROUND

In late 1999, plaintiff Thomas Bryant moved into apartment no. 733 at the Stonegate Villas Apartments in Fort Worth, Texas. On October 13, 2000, after deciding that he would like an apartment on a lower floor, the plaintiff moved to apartment no. 1313. After experiencing rashes on his skin, he moved into apartment no. 1326 in

late October or early November of 2000. Thereafter, on December 5, 2000, the plaintiff went to his primary-care physician, complaining of chronic pain and continuing skin problems and rashes. When his condition worsened, he made an appointment to see a specialist. On January 2, 2001, the plaintiff saw Dr. William Rea for "chronic pain and continuing skin problems and rashes." Dr. Rea diagnosed the plaintiff as having "toxic mold exposure, immune deregulation, allergic food gastroenteritis, mold sensitivity and toxic encephalopathy." (Pl.'s App. at 31.) Thereafter, on February 26, 2001, the plaintiff had his apartment tested for mold and discovered that it did contain various forms of mold.

On October 25, 2002, the plaintiff filed suit[1] against the defendant[2] for alleged injuries that he sustained as a result of exposure to mold in apartment no. 1326 at the Stonegate Villas Apartments. The plaintiff asserted claims against the defendant for: (1) violations of the Texas Deceptive Trade Practices Act; (2) violations of the Texas Insurance Code; (3) negligence; and (4) breach of contract/warranty. The plaintiff did not serve the defendant with process until March 18, 2003.

In its motions for summary judgment, the defendant claims that it is entitled to summary judgment because the plaintiff's claims are barred by the statute of limitations and

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[1] The case was removed to this Court on March 25, 2003, based on diversity of citizenship.

[2] The plaintiff originally sued Stonegate Villas, Metric Property Management, Inc., and USRP Texas GP, LLC. All of the defendants were subsequently dismissed from the suit except Metric Property Management, Inc.

there is no probative evidence that the plaintiff's injuries were caused by mold exposure.

## II. SUMMARY-JUDGMENT STANDARD

Summary judgment is proper when the record establishes "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). An issue is considered "genuine" if "it is real and substantial as opposed to merely formal, pretended, or a sham." *Bazan v. Hidalgo Cty.*, 246 F.3d 481, 489 (5th Cir.2001) (citing *Wilkinson v. Powell*, 149 F.2d 335, 337 (5th Cir.1945)). Facts are considered "material" if they "might affect the outcome of the suit under governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). To determine whether there are any genuine issues of material fact, the Court must first consult the applicable substantive law to ascertain what factual issues are material. *Lavespere v. Niagra Mach. & Tool Works*, 910 F.2d 167, 178 (5th Cir.1990). Next, the Court must review the evidence on those issues, viewing the facts in the light most favorable to the nonmoving party. *Id.*; *Newell v. Oxford Mgmt. Inc.*, 912 F.2d 793, 795 (5th Cir.1990); *Medlin v. Palmer*, 874 F.2d 1085, 1089 (5th Cir.1989).

In making its determination on the motion, the Court must look at the full record, including the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. *See* FED. R. CIV. P. 56(c); *Williams v. Adams*, 836 F.2d 958, 961 (5th Cir.1988). Rule 56, however, "does not impose on the district court a duty to sift through the record in search of evidence to support" a party's motion for, or opposition to, summary judgment.

*Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915-16 & n. 7 (5th Cir.1992). Thus, parties should "identify specific evidence in the record, and . . . articulate" precisely how that evidence supports their claims. *Forsyth v. Barr*, 19 F.3d 1527, 1536 (5th Cir.1994). Further, the Court's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249.

To prevail on a motion for summary judgment, the moving party has the initial burden of demonstrating that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A defendant moving for summary judgment may submit evidence that negates a material element of the plaintiff's claim or show that there is no evidence to support an essential element of the plaintiff's claim. *See Celotex Corp.*, 477 U.S. at 322-24; *Crescent Towing and Salvage Co. v. M/V Anax*, 40 F.3d 741, 744 (5th Cir.1994); *Lavespere*, 910 F.2d at 178.

To negate a material element of the plaintiff's claim, the defendant must negate an element that would affect the outcome of the action. *See Anderson*, 477 U.S. at 247. If the defendant moves for summary judgment alleging no evidence to support an essential element of the plaintiff's claim, the defendant need not produce evidence showing the absence of a genuine issue of fact on that essential element. Rather, the defendant need only show that the plaintiff, who bears the burden of proof, has adduced no evidence to support an essential element of his case. *See Celotex*, 477 U.S. at 325; *Teply v. Mobil Oil Corp.*, 859 F.2d 375, 379 (5th Cir.1988).

When the moving party has carried its summary-judgment burden, the respondent must go beyond the pleadings and by his own evidence set forth specific facts showing there is a genuine issue for trial. Fed.R.Civ.P. 56(e). This burden is not satisfied by creating some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence. *See Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir.1994). If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *See Anderson*, 477 U.S. at 249-50.

## III. ANALYSIS

### A. Statute of Limitations

The defendant asserts that all of the plaintiff's claims, including his claim for breach of contract, are subject to a two-year statute of limitations. The defendant argues that the plaintiff's alleged injuries began on October 13, 2000, when he moved into apartment no. 1313 at the Stonegate Villas. The defendant alleges that because the plaintiff did not file his suit until October 25, 2002, over two years later, his claims are barred by the statute of limitations. In addition, the defendant claims that even assuming the plaintiff had initially filed his suit within the statute of limitations, he failed to use due diligence in serving the defendant with process as required by Texas law.

The plaintiff, on the other hand, argues that his breach-of-contract claim is subject to a four-year statute of limitations. As to his other claims, the plaintiff argues that they are not barred by the two-year statute because: (1) he did not get sick from the mold in apartment no. 1326 until

November or December 2000; (2) he did not realize that his injuries were associated to the mold exposure until January 2001; and (3) his apartment was not tested for mold until February 26, 2001.

The first issue is what statute-of-limitations period applies to the plaintiff's claims. The parties appear to agree that a two-year statute applies to all of the plaintiff's claims except for the plaintiff's breach-of-contract claim. As to this claim, the plaintiff argues that a four-year statute should apply, while the defendant argues for a two-year statute because the substance of the breach-of-contract claim is based in tort.

Under Texas law, courts look to the substance of a claim, rather than the title of the cause of action, to determine which limitations provision should govern a particular claim. *See Paredes v. City of Odessa*, 128 F.Supp.2d 1009, 1015-16 (W.D.Tex.2000). Though a contract may exist, if the substance of the plaintiff's claim is based in tort, then the tort statute-of-limitations provision applies. *Id*; *see Swanson v. Arabian Am. Oil Co.*, 671 F.Supp. 1125, 1127 (S.D.Tex.1987) ("[D]espite the existence of a contract, if plaintiff pleads negligence, or pleads facts which would constitute negligence, the courts . . . will consider the cause of action to be in tort rather than contract").

As to his "breach-of-contract/warranty" claim, the plaintiff, in his complaint, states:

> The Defendants' conduct also can be seen to have violated Defendants' duties and to constitute a breach of contract and/or a breach of the implied warranty of habitability and fitness for living, and/or the implied warranty to perform services

> in a good and workmanlike manner. . . . Such breaches of contract and of warranty were a producing cause of the incident in question and the injuries and damages suffered by Plaintiff.
>
> 10.2 The risk of the injuries suffered by Plaintiff . . . were reasonably foreseeable to Defendants. Defendants . . . failed to provide for the safety of the residents of the Stonegate Villa Apartments, failed to exercise ordinary care in providing for the safety of the residents. . . .
>
> 10.3 Plaintiff alleges herein that the incident and Plaintiff's injuries and damages were proximately caused by Defendants' continued policy. . . . The acts, omissions, policy considerations, and all allegations cited above were carried out by Defendants . . . and were the result of actual conscious indifference to the welfare of Plaintiff.
>
> 10.4 The acts and/or omissions described above were jointly and/or severally a proximate or producing cause of the incident and Plaintiff's injuries and damages.

(Pl.'s Orig. Pet. at 10-11.) As to damages, the plaintiff seeks relief for various items, including medical expenses, physical pain and suffering, mental anguish, physical impairment, disfigurement, and loss of earning capacity.

After reviewing the plaintiff's complaint, the Court concludes that the plaintiff's breach-of-contract claim sounds in tort. Although he titles it a breach-of-contract claim, its supporting allegations clearly involve tort law when they urge reasonable foreseeability and a breach of the duty of ordinary care. In addition, the plaintiff fails to refer to any contract at all. Furthermore, the damages

sought are more typically found in personal-injury as opposed to breach-of-contract claims. *See, e.g., Swanson*, 671 F.Supp. at 1126. Because the plaintiff's breach-of-contract claim is really a tort claim, the two-year statute of limitations applies.

Now that the Court has determined that a two-year statute of limitations applies to all of the plaintiff's claims, the next issue is whether the plaintiff timely filed his complaint. After reviewing the evidence, the Court concludes that the plaintiff did so. The plaintiff moved into apartment no. 1326 sometime at the end of October or early November of 2000. This is the absolute earliest that his claims for injuries suffered in apartment no. 1326 could have began accruing. Because he filed his suit on October 25, 2002, within two years, the Court concludes that he timely filed it within the statute of limitations.

The next issue is whether the plaintiff's claims, although initially filed timely, are still barred by the statute of limitations. Under Texas statute-of-limitations law, "in order to 'bring suit' on a state law claim within the two-year statute of limitations, the plaintiff must not only file suit within the limitations period but must also use due diligence in serving the defendant with process if the defendant is served after the expiration of the limitations period." *Paredes v. City of Odessa*, 128 F.Supp.2d 1009, 1016 (W.D.Tex.2000) (quoting *Gant v. DeLeon*, 786 S.W.2d 259, 260 (Tex.1990) (per curiam)). If the plaintiff does not use "due diligence" to effect service, the late service will not relate back to the original filing date, and the lawsuit must be dismissed on limitations grounds. *Paredes*, 128 F.Supp.2d at 1016. According to the Dallas Court of Appeals, the "purpose behind a statute of limitations is not only to encourage a plaintiff to prosecute his claims within

a period of time but, just as important, to advise the defendant of the claim against him in a timely fashion so that he may prepare his defense and preserve evidence before the lapse of time has rendered this process difficult, if not impossible." *Broom v. MacMaster*, 992 S.W.2d 659, 664 (Tex.App. – Dallas 1999, no pet. h.). In some respects, timely service of the complaint is more important because "[i]t is the service of process that gives the defendant legal notice of the allegations being made against him." *Broom*, 992 S.W.2d at 664.

If the defendant establishes that the plaintiff failed to serve the complaint within the two-year statute of limitations, the burden shifts to the plaintiff to produce summary-judgment evidence that raises a fact question as to whether the plaintiff used due diligence in his attempt to timely serve the defendant. *Paredes*, 128 F.Supp.2d at 1018. Generally, the issue of whether a plaintiff exercised due diligence is a question of fact. *Id.* "Summary judgment should be granted on statute of limitations grounds only if the defendant shows (1) that the defendant was not served with the complaint within the two-year limitations period; and (2) as a matter of law, the plaintiff did not use due diligence in effectuating service." *Paredes*, 128 F.Supp.2d at 1018 (citing *Gant*, 786 S.W.2d at 260).

"As the term 'due diligence' implies, the plaintiff has a duty to take action to effectuate service of process on the defendant." *Paredes*, 128 F.Supp.2d at 1019. "Generally, where the plaintiff makes no attempt to serve the defendant within the limitations period, an explanation for the absence of any attempt to procure service will not raise a fact issue as to whether due diligence was used." *Id.* (citing *Rodriguez v. Tinsman & Houser, Inc.*, 13 S.W.3d 47, 50-51 (Tex.App. – San Antonio 1999, no writ) (holding that a

complete failure to attempt service of process that is due to miscommunication or mistaken belief does not raise a fact issue on due diligence because "there are no efforts from which to evaluate the reasonableness or diligence of the actor")).

In this case the parties agree that the plaintiff failed to serve the defendant until after the two-year statute of limitations had run. As to this failure, the plaintiff states:

> Plaintiff's claims originally were filed in November 2001 and later dismissed because the plaintiff could not travel to the court mandated settlement conference. *See* Affidavit of Jerry C. von Sternberg, App. pp. 33-34. The case was refiled in state court on October 25, 2002. *Id.* As is customary, counsel's office requested that the Court Clerk return a filed stamped copy. *Id.* Plaintiff's counsel never received such a copy and therefore, did not have the service Petition with which to serve Defendants. *Id.* When Defendant did not timely answer, an investigation was made as to service, and counsel's office found that no citations were requested, and on February 28, 2003, counsel immediately requested citations. Such were served on defendants in March, 2003. Defendants alleged they were served on March 18, and removed the action to federal court on March 25th. As a result, it took merely four (4) months to request citation and a little over $4^1/_2$ months for them to be served.
>
> Plaintiff's counsel's office procedures are to request a return copy of the Petition, and begin service efforts upon receipt. Unfortunately, in this instance, as noted in the files of the state court, as indicated by the Removal documents

> filed by Defendant, no return envelope was included in the original filing package. *See* Cover Letter annotated by the district clerk, App. p. 32. Counsel inquired of their office as to when service had been requested and as to the return of service. As soon as Plaintiff's counsel learned that service had not been requested, they immediately served Defendants.

(Pl.'s Resp. at 10-11.)

After reviewing the parties' arguments and the relevant case law, the Court concludes that as a matter of law the plaintiff failed to exercise due diligence in effectuating service of process on the defendant. In this case, it is clear that the plaintiff failed to take any action to effectuate service of process until February 28, 2003, which is clearly outside the two-year statute of limitations.[3] Although the plaintiff claims that he failed to take any action due to a mistake, a complete failure to attempt service of process does not raise a fact issue on due diligence because "there are no efforts from which to evaluate the reasonableness or diligence of the actor." *Rodriguez*, 13 S.W.3d at 50-51. "In cases where due diligence has been found, at least to raise a fact question, the plaintiff made some efforts to procure service but by mistake or clerical error was not immediately successful." *Paredes*, 128 F.Supp.2d at 1019.

The plaintiff, relying on *Saenz v. Keller Industries of Texas, Inc.*, 951 F.2d 665 (5th Cir.1992) and *Valdez v. Charles Orsinger Buick Co.*, 715 S.W.2d 126 (Tex.App. –

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[3] The plaintiff acknowledges in his response that he was apprised "of the causal connection between his residence in no. 1326 and his illnesses and injuries" on January 2, 2001, when he first saw Dr. Rea. (Pl.'s Resp. at 7.)

Texarkana 1986, no writ), claims that summary judgment should not be granted in favor of the defendant because a fact issue exists whether he exercised due diligence in serving the defendant. The plaintiff argues that "[b]ecause counsel in the instant case was mistaken as to the status of the service of process and such was caused by a clerical error in counsel' office, this Court should follow *Saenz* and *Valdez* on substantially similar facts and deny summary judgment as a matter of law." (Pl.'s Resp. at 12.)

After reviewing *Saenz* and *Valdez*, the Court concludes that these cases are distinguishable from this case. In *Saenz*, while filing the complaint, a secretary from the plaintiffs' law firm asked the clerk whether all the appropriate forms had been submitted. The clerk informed her that they had even though the summons request form required by the local rules was not attached. Because the request form was not submitted, the summons did not issue for service on the defendants. Over the next several months, the secretary called the clerk's office several times to inquire whether the defendants had been served. Each time, the clerk informed her that service had not yet been accomplished. Eventually, the secretary was told that no summons was on file. At that point, the plaintiffs' attorney submitted a summons request form and the defendants were served. The Court in *Saenz* held that a fact issue regarding whether the plaintiffs engaged in due diligence existed because the plaintiffs had relied on a miscommunication with the clerk's office.

Similarly, in *Valdez*, the plaintiff failed to obtain service on a second defendant because the amount of the fee filed with the complaint covered service on only one defendant, even though the local rules publicized the amount of the filing fee required for serving two defendants. A

secretary at the plaintiff's law firm had telephoned the district clerk to find out the amount of the fee, and the clerk told her the amount of the fee for service upon only one defendant. The plaintiff filed a check for the amount stated by the clerk and summons issued for service upon only one of the two defendants. The error was not discovered until after the statute of limitations had expired.

In both *Valdez* and *Saenz*, the courts concluded that a fact issue existed as to due diligence when the plaintiff, although failing to follow local rules, relied on a miscommunication with the clerk's office. In this case, the plaintiff does not have the excuse that he relied on a miscommunication with the clerk's office in an attempt to show due diligence. Instead, the plaintiff's only excuse for not serving the defendant within the statute of limitations is that he forgot to enclose a return envelope with his petition and so never received a return copy of the petition – which would have served as a reminder that he needed to effect service of process on the defendant. In other words, the plaintiff did absolutely nothing to effect service of process on the defendant. He was not prevented from obtaining service of process because the defendant was evading service or unable to be located or because of misinformation from the clerk's office. Instead, the plaintiff did not serve process on the defendant for several months after the statute of limitations had expired because he simply forgot to do so. Such an excuse is really no excuse at all and cannot, as a matter of law, be considered as due diligence. Because the plaintiff did not use due diligence in serving the defendant after the expiration of the statute of limitations, the plaintiff's claims are barred by the statute of limitations.

B. Evidence of Causation

To prevail on this claims [sic], the plaintiff must show by a reasonable medical probability through competent expert testimony that his alleged injuries were caused by mold exposure at the Stonegate Villas Apartments. *See, e.g., Brookshire Bros., Inc. v. Smith*, No. 01-02-00677, 2004 WL 1064776, at (Tex.App. – Houston [1st Dist.] May 13, 2004, no pet. h.); *Coastal Tankships USA, Inc. v. Anderson*, 87 S.W.3d 591, 610 (Tex.App. – Houston [1st Dist.] 2002, pet. denied); *Leitch v. Hornsby*, 935 S.W.2d 114, 118-20 (Tex.1996). The defendant argues that it is entitled to summary judgment because the plaintiff has presented no probative evidence of causation that the plaintiff's injuries were caused by mold exposure at the Stonegate Villas. The plaintiff, on the other hand, argues that it does have evidence of causation – the declaration of Dr. Rea. In his declaration, Dr. Rea states:

> 3. I was consulted by Thomas Bryant for the first time on January 2, 2001, with chief complaints of mold exposure, abdominal pain, abdominal cramps, skin rash, cervical lymph node pain, food sensitivities, inhalant sensitivities and syncope. He also developed respiratory symptoms, including difficulty in breathing after food consumption. I subsequently saw and treated him for Esophagitis, Escophageal Spasm, Allergic Food Gastroenteritis and Weight Loss.
>
> 4. I diagnosed this patient as having toxic mold exposure, immune deregulation, allergic food gastorenteritis, mold sensitivity and toxic encephalopathy. It is my opinion, based upon my examination of Thomas Bryant, as well as my education, training, skill and experience, that

> within a reasonable medical probability, the conditions observed by me in January, 2001 and thereafter, were caused by exposures to mixed molds and their associated mycotoxins, during his residency at Apartment No. 1326, Stonegate Villas, commencing in November, 2000.

(Pl.'s App. at 30-31.)

After reviewing Dr. Rea's declaration, the Court concludes that it is not competent summary judgment evidence and should be stricken because it is conclusory and does not recite any of the specific facts or steps supporting his conclusions. "Rule 56(e) of the [Federal] Rules of Civil Procedure provides that affidavits supporting and opposing motions for summary judgment must do more than present something that will be admissible in evidence." *Mid-State Fertilizer Co. v. Ex. Nat'l Bank of Chicago*, 877 F.2d 1333, 1339 (7th Cir.1989). "They shall 'set forth facts' and by implication in the case of experts (who are not 'fact witnesses') a process of reasoning beginning from a firm foundation." *Id.* (quoting *Am. Key Corp. v. Cole Nat'l Corp.*, 762 F.2d 1569, 1579-80 (11th Cir.1985)). "An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process." *Mid-State Fertilizer Co.*, 877 F.2d at 1339; *see Minasian v. Standard Chartered Bank, PLC*, 109 F.3d 1212, 1216 (7th Cir.1997) ("An expert is entitled to offer a view on the ultimate issue, see Fed.R.Evid. 704(a), but an expert's report that does nothing to substantiate this opinion is worthless, and therefore inadmissible"). *Richardson v. Richardson-Merrell, Inc.*, 857 F.22d [sic] 823, 829-32 (D.C.Cir.1988) (holding that an expert's declaration, full of assertion but empty of facts and reasons, will not get a case past a motion for summary judgment, for the judgment must

"look behind [the expert's] ultimate conclusion . . . and analyze the adequacy of its foundation").

In this case, Dr. Rea presents nothing but conclusions in his affidavit. He fails to provide any facts, any hint of an inferential process, or any discussion of a medical foundation that supports his conclusion that the plaintiff's illnesses were caused by his exposure to mold while living in apartment no. 1326. Consequently, the Court concludes that Dr. Rea's declaration must be stricken and the defendant is entitled to summary judgment on all of the plaintiff's claims because the plaintiff has failed to provide any evidence of causation.

## IV. CONCLUSION

Based on the foregoing, it is ORDERED that the defendant's Motion for Summary Judgment [doc. # 10-1] is GRANTED.

**APPENDIX C**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 04-10941

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THOMAS BRYANT,

Plaintiff-Appellant,

v.

STONEGATE VILLAS; ET AL.,

Defendants,

METRIC PROPERTY MANAGEMENT, INC.,

Defendant-Appellee

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Appeal from the United States District Court
for the Northern District of Texas, Forth Worth

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**ON PETITION FOR REHEARING**

(Filed Sep. 29, 2005)

Before REAVLEY, HIGGINBOTHAM and CLEMENT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ Norman M. Reavley
United States Circuit
Judge